



**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]

DECISION

CWK/145185

PRELIMINARY RECITALS

Pursuant to a petition filed November 09, 2012, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Brown County Human Services in regard to Medical Assistance, a hearing was held on December 18, 2012, at Green Bay, Wisconsin.

The issue for determination is whether the Department erred in its denial of continued CLTS Waiver services.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Tammy Smetana

Brown County Human Services
Economic Support-2nd Floor
111 N. Jefferson St.
Green Bay, WI 54301

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Brown County.
2. Petitioner is 14 years old and has been previously receiving services under the CLTS Waiver.

3. Petitioner has been diagnosed with autism spectrum disorder, ADHD, and other diagnoses not pertinent here.
4. Petitioner needs reminders to take a shower, brush teeth, and as to what type of clothing is appropriate for weather.
5. Petitioner has difficulty problem solving.
6. Petitioner is in high school has a classroom aid in all classes.
7. Petitioner has immature social skills and has not developed friendships.
8. Petitioner was recently determined to have an IQ of 89 placing him in the 23rd percentile of peers. This is considered the upper end of the low-average range.
9. The Department sent notice to petitioner on October 1, 2012 informing him that is would be discontinuing CLTS Waiver eligibility due to petitioner no longer meeting the ICF/DD level of care.
10. Petitioner filed a timely appeal.

DISCUSSION

I. INTRODUCTION

The CLTS program started on January 1, 2004, after the federal Department of Health and Human Services informed Wisconsin that federal MA funding would no longer be available for in-home autism services. The Wisconsin Department of Health and Family Services released the *Medicaid Home and Community-Based Services Waivers Manual (Manual)* to assist in administering the CLTS program. The *Manual* also covers the Community Integration 1A and 1B programs, and the Brain Injury Waiver program. It can be found on the internet at <http://dhfs.wisconsin.gov/bdds/waivermanual/index.htm>.

The *Manual* requires a person to meet several eligibility criteria for the CLTS program, including disability and meeting an institutional level of care. *Manual*, §2.01 – 2.02 (2010). The disability determination is made for the agency by the Wisconsin Disability Determination Bureau. If the child clears this hurdle, the second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. See 42 C.F.R. §435.225(b)(1).

The level of care criteria are found in the *Manual* at Appendix A-10 (cross-referenced from *Manual* §2.07D), which defines and describes childhood care levels. There is no dispute that the petitioner does not satisfy the Hospital, Nursing Home or SED care levels described in the *Manual*. *Id.* The ICF/DD care level is for individuals who suffer from mental retardation or a developmental disability.

II. ICF/DD ANALYSIS.

The criteria for the various CLTS levels of care are set forth and defined in the *Institutional Levels of Care-CLTS* publication by the Department of Health Services, updated February 2011 and available at: http://www.dhs.wisconsin.gov/bdds/waivermanual/CLTS_LOC.pdf. The ICF/DD level applies to a child who meets ALL THREE of the following criteria: (1) a cognitive disability that results in a substantial learning impairment, (2) substantial functional limitations, and (3) a need for active treatment. All three of these major criteria must be met to qualify for this care level. The Department has based its decision to

discontinue CLTS services based on element #1 – the absence of a **substantial learning impairment**; and element #2 – the absence of **substantial functional limitations**.

The Department found no “substantial learning impairment” on petitioner’s part. According to the *Institutional Levels of Care-CLTS* manual, “substantial learning impairment is described as follows:

The diagnosis must have resulted in the child having **substantial learning impairments** as measured by **ONE** of the following:

1. A 30% (25% if the child is under one year of age) or greater delay in aggregate intellectual functioning, based on valid, standardized and norm referenced measures of aggregate intellectual functioning; OR 2/7/2011 INTERMEDIATE CARE FACILITY (ICF/MR) LEVEL OF CARE – 4
2. A score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean on valid, standardized and norm referenced measures of aggregate intellectual functioning.

The cognitive disability criterion is not met solely based on diagnosis, but must result in a substantial learning impairment as defined above. For example, children with Autism Spectrum Disorders, Cerebral Palsy or Spina Bifida without a substantial learning impairment do not meet the ICF/MR LOC. They may be evaluated against the Nursing Home level of care screen in the case of a child with Cerebral Palsy or Spina Bifida, or the Psychiatric Hospital level of care screen in the case of a child with an Autism Spectrum Disorder.

For example, children who would MEET Criterion 1- Cognitive Disability:

- A 12-year-old child with Down Syndrome and a full scale IQ of 56. *This child has a diagnosis similar to a Cognitive Disability and a substantial impairment in learning, based on an IQ of 56 on the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), a valid, standardized and norm referenced measure of aggregate intellectual functioning, and therefore meets Criterion 1.*
- A 2-year-old child diagnosed with global developmental delays who has a 30% delay in cognitive development based on valid, norm referenced Birth-3 testing. *This child has a diagnosis similar to a Cognitive Disability and has a measured substantial impairment in learning and therefore meets Criterion 1.*

For example, children who would NOT MEET Criterion 1- Cognitive Disability:

* * *

- A child whose school testing shows evidence of learning disabilities that require a more structured educational environment plus other special modifications to address the child's individual learning style. The child continues to reason, problem-solve, and learn at a reasonable functional level even though she is behind same aged peers. *This child's functional limitations with regard to cognitive capacity do not demonstrate substantial impairments in learning and therefore this child would not meet Criterion 1.*

*The Cognitive Disability Criterion must be met before considering Criterion 2: Substantial Functional Limitations. If the Cognitive Disability Criterion is not met, the reviewer **must stop here**, but may consider levels of care other than ICF/MR (DD), if appropriate.*

In this case, petitioner argues that he has a substantial learning impairment making him eligible for the waiver. The Department argued that petitioner 89 IQ is not 2 standard deviations below the mean which would actually be a score of 70. But, I note that petitioner has submitted a report from Irma Casey Smet, PhD which was based on a two day assessment conducted on October 23 and 24, 2012. In the section of the report designated "Learning and Memory" the report states:

█'s ability to learn a complex figure over 20 minutes was entirely intact.... █'s ability to learn and remember 15 words over 5 trials and after 20 minutes was generally in the average range.... His visual immediate and delayed memory fell in the average range for immediate recall, upper end of the low average range for delayed recall. He had the greatest difficulty with recognizing previously seen faces. His ability to remember 2 stories over 20 minutes fell within the average to high average range. In general, learning and memory are intact.

In the "Conclusions and Recommendations" section of the report, the evaluator states:

The present test results suggest that █ is functioning in the very upper end of the low average range of intellectual abilities actually compromised by slower processing speed.

While it is clear that petitioner has deficiencies, neither this report nor the functional screen nor the IQ test reflect a substantial learning impairment of the type required under the terms of the waiver and the program policies.

The Department also found no "substantial functional limitations" on petitioner's part. Substantial Functional Limitations are defined, for the purposes of CLTS level of care at pages 4-6 of the *Institutional Levels of Care-CLTS* publication:

SUBSTANTIAL FUNCTIONAL LIMITATIONS

The child demonstrates substantial functional limitations when compared to the child’s age group and each limitation must be expected to last *at least 12 months* from the date of review. These limitations must be the direct result of the child’s cognitive disability or similar diagnosis from Criterion 1, and must place the child at risk of institutionalization in an ICF/MR in the absence of extensive, consistent, and direct adult intervention to assist the child in overcoming the limitations, significantly beyond the level of intervention similar aged peers typically require. **The child must demonstrate substantial functional limitations in ONE or more of the following developmental domains: (1) communication, or (2) social competency, or (3) activities of living.**

(Emphasis added). Deficits in Social Competency are further explained in *Institutional Levels of Care-CLTS*, Appendix A:

Social competency includes children's ability to form relationships, interest in and skills needed to maintain positive relationships with adults and children, ability to understand the perspective and feelings of others, and skills needed to get along well in a group setting (for example, conflict resolution skills).

Petitioner argued primarily that petitioner suffers from limitations in social skills. Petitioner points to certain incidents of inappropriate behavior toward peers. Petitioner noted at the time of the hearing an incident of inappropriate touching of a peer. Because I agree with the Department with regard to the absence of substantial learning impairment, I do not address this criterion fully. But, I note that the Appendix A of the *Institutional Levels of Care-CLTS* publication notes that a 14-17 year old has a substantial functional limitation if he consistently exhibits one of the following:

- Is not self confident in social situations. Is not comfortable enough to express his/her opinion in everyday peer interactions.
- Does not assert social autonomy from parents.
Does not make decisions about interests, activities or ideas independent from his/her parents.
- Repeatedly does not avoid situations that are likely to result in trouble.
Gets involved in situations that have caused trouble in the past or does not avoid peer pressure in going along with a bad idea.

It seems that the record would support a finding of a substantial limitation in social competency. But, the Department denial is affirmed based on the lack of substantial learning impairment resulting from the autism spectrum disorder.

CONCLUSIONS OF LAW

The Department did not err in denying continued CLTS waiver eligibility.

THEREFORE, it is

ORDERED

That this appeal is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 23rd day of January, 2013

\sJohn P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on January 23, 2013.

Brown County Human Services
Bureau of Long-Term Support